

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 63997-8-I
Respondent,)	
)	DIVISION ONE
v.)	
)	
ROBERTO HERNANDEZ,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: July 26, 2010
)	

Becker, J. — The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the assistance of an attorney free from conflicts of interest. The State charged Roberto Hernandez with delivery of heroin after he sold drugs to a confidential police informant. The confidential informant was unavailable to testify at trial. Hernandez contends that his trial attorney's representation was constitutionally deficient because the public defender's office also represented the informant on a different matter. But because Hernandez has not shown that his attorney had an actual conflict of interest that adversely affected his performance, he has failed to establish a Sixth Amendment violation. We therefore affirm Hernandez's conviction for delivery of heroin.

No. 63997-8-I/2

FACTS

The State charged Hernandez with one count of unlawful delivery of a controlled substance after he allegedly sold heroin to Wesley Stock, a confidential police informant. Prior to trial, the deputy prosecutor advised the court that the police could not find Stock to testify at trial, but that the identity of the informant had been disclosed to the defense. The deputy prosecutor noted that the Whatcom County Public Defender's Office was also representing Stock on a pending case and that Stock was out on warrant status. Hernandez's public defender responded that his only concern was a need to cross-examine officers about Stock's reliability. Defense counsel also expressed his intention to request a missing witness instruction.

At trial, Detective Kent Poortinga testified that the Bellingham Police Department arranged an undercover controlled purchase of heroin on January 22, 2009, using Stock, a confidential informant who was "trying to work off" a charge of possession of heroin. From the police station, Stock called a man named "Roberto" and arranged to buy \$100 of heroin at a Fred Meyer store.

Police officers searched Stock to make sure he had no drugs or money and then gave him \$100 in recorded buy money. Officers then drove Stock to the Fred Meyer and watched from unmarked cars as he went into the lobby and placed a call from the pay phone. Stock came out of the store and waited a few

minutes until a white car drove up. He got into the front seat, and the car travelled a short distance in the parking lot.

About 30 seconds later, Stock got out of the car and returned directly to the store, where officers found heroin in his pants pocket. An arrest team stopped the white car and arrested Hernandez, the driver and sole occupant.

After being advised of his rights, Hernandez denied being a drug dealer. He acknowledged that he was a heroin user and that he regularly collected money from friends to buy a half-ounce of heroin from a person in Mount Vernon. Hernandez would then share the heroin with the friends who provided the money. In a search incident to the arrest, police officers found \$97 in Hernandez's wallet and the \$100 of recorded buy money in the car's ashtray. The officers did not find any drugs or drug paraphernalia.

Detective Poortinga testified that Stock had voluntarily approached the police to become an informant. After participating in the controlled buy, Stock had disappeared. Despite making calls and watching Stock's residence, the police had been unable to find him for trial. During cross-examination, Poortinga acknowledged that an informant would have to complete transactions in order to work off a charge.

The trial court denied defense counsel's request for a missing witness instruction, concluding that Stock was not peculiarly available to the State. During closing argument, defense counsel repeatedly asserted that Stock had

framed Hernandez.

The jury found Hernandez guilty as charged, and the court imposed a standard range term.

DECISION

For the first time on appeal, Hernandez contends that his trial counsel, a member of the Whatcom County Public Defender's Office, had a conflict of interest because the Office was simultaneously representing Hernandez on the current criminal charge and Stock on other matters, including the potential charge for possession of heroin that Stock was working off as a confidential informant. Hernandez argues that he was denied his right to effective assistance because the conflict prevented defense counsel from calling Stock as a witness and hampered the opportunity to obtain a missing witness instruction.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant effective assistance of counsel, free from any conflict of interest in the case. Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); see also State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). A conflict of interest exists if a defense attorney owes duties to a party whose interests are adverse to those of the defendant. State v. White, 80 Wn. App. 406, 411-12, 907 P.2d 310 (1995), review denied, 129 Wn.2d 1012 (1996). In addition, the Washington Rules of Professional Conduct prohibit an attorney from representing a client if the attorney's duties will be directly adverse to

another client or materially limit the attorney's representation. See RPC 1.7(a). Under RPC 1.10(a), all members of a law firm are treated as a single attorney for purposes of RPC 1.7. See State v. Ramos, 83 Wn. App. 622, 629, 922 P.2d 193 (1996). "Public Defender agencies are considered 'law firms' for purposes of application of the RPC." Ramos, 83 Wn. App. at 629.

But the RPC "does not embody the constitutional standard for effective assistance of counsel on appeal." White, 80 Wn. App. at 412-13. In order to establish a Sixth Amendment violation, Hernandez must show that an actual conflict of interest adversely affected his attorney's performance. See Dhaliwal, 150 Wn.2d at 571, citing Mickens v. Taylor, 535 U.S. 162, 172 n.5, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002). Although a defendant need not demonstrate that the outcome of the trial would have been different but for the conflict, the "mere theoretical division of loyalties" is insufficient to establish a Sixth Amendment violation. Mickens, 535 U.S. at 171; see also State v. Fualaau, 155 Wn. App. 347, 362, 228 P.3d 771 (2010). A conflict adversely affects counsel's performance if "some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." State v. Regan, 143 Wn. App. 419, 428, 177 P.3d 783 (internal quotation marks omitted) (quoting United States v. Stantini, 85 F.3d 9, 16 (2d Cir. 1996)), review denied, 165 Wn.2d 1012 (2008).

Hernandez contends that defense counsel's attempt to serve the interests of both Hernandez and Stock resulted in counsel's failure to call Stock as a witness and inability to cross-examine him about the defense claim that he had framed Hernandez. But the evidence was undisputed that the police made repeated unsuccessful attempts to locate Stock. Nothing in the record suggests that defense counsel was aware of Stock's location or could have called him as a witness.

Moreover, defense counsel vigorously exploited Stock's absence by cross-examining the police officers about Stock's reliability and his need to complete transactions in order to "work off" charges or obtain leniency. Coupled with evidence that Stock had suggested using the pay phone inside the Fred Meyer, these circumstances permitted defense counsel to challenge Stock's reliability and argue that Stock had framed Hernandez, without Stock's potentially incriminating testimony. Hernandez makes no showing that defense counsel's failure to call Stock was not in his best interests. See Martinez, 53 Wn. App. 709, 770 P.2d 646 (public defender's decision not to call juvenile witness who was also represented by public defender's office served defendant's best interests and did not constitute ineffective assistance of counsel), review denied, 112 Wn.2d 1026 (1989).

Hernandez's claim that defense counsel's "simultaneous representation" of Hernandez and Stock affected the opportunity to obtain a missing witness

instruction is also without merit. The trial court denied defense counsel's request for a missing witness instruction based on undisputed evidence that the State, despite diligent efforts, was unable to find Stock. Because Stock's absence was explained and there was no showing that he was peculiarly available to the State, the trial court properly declined to give a missing witness instruction. See State v. Lopez, 29 Wn. App. 836, 841, 631 P.2d 420 (1981). Defense counsel's alleged conflict had no effect on the availability of a missing witness instruction.

Hernandez's failure to demonstrate a conflict that adversely affected his attorney's performance also defeats his claim that he is entitled to a new trial because the trial court failed to inquire further into the circumstances surrounding the conflict. Generally, the trial court has a duty to investigate potential attorney-client conflicts of interest if it knows or reasonably should know that a potential conflict exists. Regan, 143 Wn. App. at 425-26, citing Mickens, 535 U.S. at 425-26. But because Hernandez raised no objection to the claimed conflict in the trial court, the trial court's failure to inquire is not reversible error unless Hernandez can demonstrate that defense counsel had an actual conflict that adversely affected his performance. See State v. Dhaliwal, 150 Wn.2d at 570.

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Affirmed.

Becker, J.

WE CONCUR:

Jan, J.

Edington, J.